Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-1306–08 OF 2015
S NANTHA BALAN J
18 JULY 2016

Civil Procedure — Declaration — Application for — Plaintiff born as female sought declaration that he was male follow sex-change operation — Plaintiff sought orders to direct National Registration Department ('NRD') to change particulars in his identity card to show he was male — Whether application genuine and satisfied criteria for its grant — Whether court had power to direct NRD to change plaintiff's gender in his identity card

The plaintiff ('Tan'), who was born a female but later underwent gender reassignment surgery, asked the High Court in the instant application to declare that 'he' was now legally a male and to direct the defendant to change his name in his National Registration Identity Card ('NRIC') to 'Tan Yien How' and alter the last digit in the NRIC to a digit that showed he was male. From a very young age, Tan felt like a man trapped in a woman's body. He had all the while behaved like a man, dressed as one and grew up longing to become a man. When he was 22 years old, Tan underwent surgery at a medical institution in Thailand to remove his abnormal female genitalia and replace them with male genitalia. He subsequently became romantically involved with a woman whom he planned to marry. In support of his instant application, Tan tendered the reports of six medical specialists who had examined him and found that physically and psychologically he was male and that he did not have any internal or external female organs. The defendant did not dispute the conclusions and opinions of those specialists nor did it produce any expert medical opinion of its own in rebuttal. The defendant, however, said the application should be dismissed, inter alia, on the ground there was no evidence to show a mistake in fact or substance had occurred in the description of Tan's gender in his certificate of birth and thereafter in his NRIC. The gender reassignment surgery that Tan underwent could not affect the status of his gender at the time of his birth. The defendant said there was no legislation that enabled a person's gender in his birth certificate or NRIC to be altered/amended simply because the person had undergone a 'sex change' operation as the only relevant legislation in s 27(3) of the Births and Deaths Registration Act 1957 and s 6(2) of the National Registration Act 1959 permitted amendments to, respectively, the birth register and the NRIC, only if an error of fact or substance in the initial registration of the sex of the person concerned had occurred, which was not the case here.

Held, allowing the application:

(1) On the facts and circumstances, the plaintiff, who was born as a female and grew up behaving and living like a male and underwent gender reassignment surgery and had obtained validation of the medical profession that he was a man, had in the court's view satisfied the threshold or criteria that was set out in *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara* [2012] MLJU 1755; [2013] 4 CLJ 627 ('*Kristie Chan*'s case') for the application to be allowed (see para 71).

(2) It all boiled down to the quality and persuasiveness of the medical and psychiatric evidence and the factual matrix that was presented to the court as the application for a declaration had to be for genuine reasons and not for spurious or suspicious reasons. The plaintiff's application was a genuine one by a person who had been certified by the medical profession to be physically, anatomically and psychologically a male. It only remained for the legal process to declare that he was a male. A declaration to recognise the plaintiff's reassigned gender would contribute to certainty and avoid confusion and quite possibly conflict as well. The plaintiff had a constitutional right to life under art 5(1) of the Federal Constitution and the concept of 'life' thereunder necessarily encompassed the plaintiff's right to live with dignity as a male and be legally accorded judicial recognition as a male (see paras 64, 66 & 72).

(3) There was no legal impediment or restriction to the grant of a declaration to legally recognise the plaintiff as a male person and for his NRIC to be changed to reflect the change in gender so that he would be able to live as a male and be accepted by society as one. No doubt certain theological or other quarters might decry such curial recognition as an interference with the gender of a person that was determined at birth by nature. But such a line of thinking stemmed from the old or orthodox school which held the view that the gender which was determined at birth was fossilised and was incapable of change or reassignment (see para 68).

(4) The Court of Appeal ('COA') in *Kristie Chan*'s case did not lay down any inflexible rule that the applicant seeking a declaration for change of gender as a result of gender reassignment surgery must establish, inter alia, the chromosomal requirement. It was clear that in *Kristie Chan*'s case, the COA was not satisfied with the quality of the medical and psychiatric evidence that was produced. The chromosomal requirement was archaic and had to be discarded because scientifically it was impossible for a biological male to have female chromosomes and vice versa. The male XY and female XX chromosomes would remain static throughout an individual's natural life. Hence, it was naive to suggest that an applicant had to show that he or she had the chromosome of the reassigned sex. To insist on that requirement was to ask for the impossible (see paras 54, 61 & 64).

[Bahasa Malaysia summary

Plaintif ('Tan'), yang dilahirkan sebagai perempuan tetapi kemudian menjalani pembedahan pertukaran jantina, meminta Mahkamah Tinggi dalam permohonan ini untuk mengisytiharkan bahawa 'he' adalah sekarang lelaki secara sah dan mengarahkan defendan untuk menukar namanya di dalam kad pengenalan ('KP') kepada 'Tan Yien How' dan menukar digit akhir di dalam KP yang menunjukkan dia adalah lelaki. Sejak dari kecil lagi, Tan merasakan seperti lelaki yang terperangkap di dalam badan perempuan. Dia telah selama ini berkelakuan seperti lelaki, berpakaian seperti seorang dan membesar dengan keinginan menjadi seorang lelaki. Apabila dia berumur 22 tahun, Tan menjalani pembedahan di institusi perubatan di Thailand untuk membuang alat kelamin perempuan yang tidak normal dan menggantikannya dengan alat kelamin lelaki. Seterusnya, dia terlibat dalam perhubungan percintaan dengan wanita yang dia merancang untuk berkahwin. Dalam menyokong permohonannya ini, Tan mengemukakan laporan enam pakar perubatan yang telah memeriksanya dan mendapati bahawa dia secara fizikal dan psikologi adalah lelaki dan dia tidak mempunyai apa-apa organ dalaman atau luaran wanita. Defendan tidak mempertikaikan keputusan dan pendapat pakar-pakar dan tidak juga ia mengemukakan apa-apa pendapat pakar perubatan yang tersendiri dalam bantahan. Defendan, walau bagaimanapun, mengatakan permohonan sepatutnya ditolak, antara lain, atas alasan tiada keterangan untuk menunjukkan kesilapan dalam fakta atau bahan telah terjadi dalam keterangan jantina Tan dalam sijil kelahirannya dan selepas itu dalam kad pengenalannya. Pembedahan pertukaran jantina yang dijalankan Tan tidak boleh menjejaskan status jantina pada waktu kelahirannya. Defendan mengatakan bahawa tiada undang-undang yang membolehkan jantina seseorang dalam sijil kelahirannya atau KP ditukar/dipinda semata-mata kerana seseorang telah menjalani satu pembedahan 'pertukaran jantina' sebagai satu-satunya undang-undang yang berkaitan dalam s 27(3) Akta Pendaftaran Kelahiran dan Kematian 1957 dan s 6(2) Akta Pendaftaran Negara 1959 membenarkan pindaan kepada, masing-masing, pendaftaran kelahiran dan KP, hanya jika satu kesilapan fakta atau bahan dalam permulaan pendaftaran jantina seseorang itu telah berlaku, yang mana bukan kes di sini.

Diputuskan, membenarkan permohonan:

(1) Pada fakta dan keadaan, plaintif, yang dilahirkan perempuan dan membesar berkelakuan dan hidup sebagai seorang lelaki dan melalui pembedahan pertukaran jantina dan telah memperolehi pengesahan daripada profesion perubatan bahawa dia adalah lelaki, telah dalam pandangan mahkamah memuaskan ambang atau kriteria yang dinyatakan dalam kes *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara* [2012] MLJU 1755; [2013] 4 CLJ 627 (kes *Kristie Chan*) untuk permohonan dibenarkan (lihat perenggan 71).

(2) Itu semua bergantung kepada kualiti dan keyakinan keterangan perubatan dan psikiatrik dan fakta matriks yang dikemukakan ke mahkamah sebagai permohonan untuk perisytiharan harus atas sebab yang tulen dan bukan untuk sebab yang palsu atau mencurigakan. Permohonan plaintif adalah tulen oleh seseorang yang telah disahkan oleh profesion perubatan sebagai lelaki secara fizikal, anatomi dan psikologi. Yang tinggal hanya untuk proses undang-undang untuk mengisytiharkan bahawa dia adalah lelaki. Satu pengisytiharan untuk mengakui pertukaran jantina plaintif akan menyumbang kepada kepastian dan mencegah kekeliruan dan kemungkinan juga konflik. Plaintif mempunyai hak perlembagaan untuk hidup di bawah perkara 5(1) Perlembagaan Persekutuan dan konsep 'life' di bawahnya semestinya merangkumi hak plaintif untuk hidup dengan maruah sebagai seorang lelaki dan secara sah diberi pengiktirafan kehakiman sebagai seorang lelaki (lihat perenggan 64, 66 & 72).

(3) Tiada halangan atau sekatan undang-undang dengan pemberian perisytiharan untuk mengiktiraf plaintif secara sah sebagai seorang lelaki dan untuk KP nya ditukar untuk mencerminkan pertukaran dalam jantina supaya dia akan dapat hidup sebagai seorang lelaki dan diterima oleh masyarakat sebagai satu. Tidak syak lagi teologi tertentu atau lain-lain pihak mungkin mengutuk pengiktirafan kurial seperti gangguan dengan jantina seseorang itu ditentukan ketika lahir secara semula jadi. Tetapi garis pemikiran yang berpunca dari golongan lama atau ortodoks yang memegang pandangan bahawa jantina yang ditentukan pada kelahiran adalah fosil dan tidak mampu mengubah atau menukar semula (lihat perenggan 68).

(4) Mahkamah Rayuan (MR) dalam kes *Kristie Chan* bukan sahaja tidak meletakkan apa-apa kaedah yang tidak fleksibel bahawa pemohon memohon pengisytiharan untuk perubahan jantina akibat pembedahan pertukaran jantina mesti dibuktikan, antara lain, keperluan kromosom. Adalah jelas dalam kes *Kristie Chan*, MR tidak berpuas hati dengan kualiti keterangan perubatan dan psikiatrik yang dikemukakan. Keperluan kromosom adalah kuno dan perlu diabaikan kerana secara saintifik adalah mustahil untuk lelaki biologi untuk mempunyai kromosom perempuan dan sebaliknya. Kromosom lelaki XY dan perempuan XX akan kekal statik sepanjang kehidupan semula jadi individu. Maka, ia adalah naif untuk mencadangkan bahawa pemohon perlu menunjukkan bahawa dia lelaki atau perempuan mempunyai kromosom jantina yang ditukarkan (lihat perenggan 54, 61 & 64).]

Notes

For cases on application for declaration, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 2956–2997.

Cases referred to

A v Chief Constable of West Yorkshire Police and another [2004] 2 FCR 160, HL (refd)
Attorney-General For The Commonwealth v Kevin and Others [2003] FamCA 94 (folld)
Bellinger v Bellinger [2003] UKHL 21; [2003] 2 WLR 1174; [2003] 2 AC 467, HC (refd)
Corbett v Corbett (otherwise Ashley) [1970] 2 All ER 33 (refd)
Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101, FC (refd)
Fau En Ji v Ketua Pengarah Jabatan Pendaftaran Negara [2015] 1 CLJ 803; [2014] 1 MLRHU 1097, HC (refd)
Goodwin v United Kingdom [2002] 2 FCR 577 (refd)
Hamalainen v Finland [2015] 1 FCR 379 (refd)
Ikebife Ibeneweka and others v Peter Egbuna and another [1964] 1 WLR 219, PC (refd)
JG, JG v Pengarah Jabatan Pendaftaran Negara, Re [2006] 1 MLJ 90, HC (refd)
Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara [2012] MLJU 1755; [2013] 4 CLJ 627, CA (folld)
R v Tan and others [1983] 2 All ER 12, CA (refd)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211; [1966] LNS 187; [1966] 1 MLRH 288, FC (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)
Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara [2005] 1 MLJ 551; [2005] 1 CLJ 622; [2004] 3 MLRH 127, HC (refd)

Legislation referred to

Birth and Death Registration Act 1957 s 27(3)
Federal Constitution art 5(1)
Gender Recognition Act 2004 [UK]
National Registration Act 1959 s 6, 6(2)
National Registration Regulations 1990 reg 14
Rules of Court 2012 O 53 r 2(2)
Sexual Offences Act 1965 [UK]
Specific Relief Act 1950 s 41

William Lim (Muhammad Izzat bin Md Jonid with him) (Tan Aik Kiong & Co) for the plaintiff.
Mohamad Rizal bin Fadzil (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

S Nantha Balan J:

INTRODUCTION

[1] These are my grounds in respect of an application by way of an originating summons dated 24 August 2015. In this case the plaintiff who was born as a woman, has undergone gender reassignment surgery and now seeks to obtain a declaration that 'he' is legally a male and for consequential orders to direct the Director General of the National Registration Department of Malaysia to recognise and give effect to such declaration. For convenience and to avoid confusion, I shall refer to the plaintiff by the masculine gender rather than the feminine gender.

[2] I should state at the outset that this area of the law in Malaysia and other jurisdictions is not quite settled. Judicial opinion has been divided. In some cases, the courts have rejected the attempt to obtain curial recognition of gender reassignment on the ground, inter alia, that the person seeking a declaration was not able to satisfy the 'chromosomal' requirement for the particular gender. See: (a) *Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551 HC; [2005] 1 CLJ 622; [2004] 3 MLRH 127; (b) *Fau En Ji v Ketua Pengarah Jabatan Pendaftaran Negara* [2015] 1 CLJ 803; [2014] 1 MLRHU 1097; (c) *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 WLR 1174; [2003] 2 AC 467; and (d) *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33. But that has not always been the case. See: *Re JG, JG v Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90 (HC) where the High Court declined to follow the chromosomal requirement as a criteria for determination of gender post gender reassignment surgery.

[3] Hence, the question presently is, inter alia, whether this court should follow the one or the other approach and either grant the declaration that is sought or reject it, inter alia, on the basis that the plaintiff does not have male chromosomes. As stated earlier, the plaintiff was biologically and genetically born as a female and so will not carry the male chromosomes. I shall return to this point later in this judgment. I now turn to deal with the background facts.

BACKGROUND FACTS

[4] The plaintiff was born on 7 April 1987 as a female. The plaintiff is presently 29 years old. According to the narrative, from a young age, the plaintiff behaved like a male and dressed up like a male and grew up hoping and wanting to become a man. To this end, the plaintiff has exhibited various photographs which were taken when he was growing up. The photographs are found in exh A2 encl 2 and they show quite clearly that the plaintiff, although

born as a female, exhibited male characteristics and was a 'male trapped in a female body'. Medically, the plaintiff was diagnosed as 'a naturally occurring transsexual with gender-identity as male'.

[5] Eventually, the plaintiff took the ultimate step in becoming a male and in October 2009, the plaintiff had successfully undergone gender reassignment surgery at a medical institution known as the Preecha Aesthetic Institute ('the Institute') in Thailand. The Institute is said to be a prominent medical institution for gender reassignment surgery. The credentials of the Institute and that of its founder, Dr Preecha Tiewtranon are seen in exh A11 annexed to encl 6. It is quite obvious from the literature that was exhibited that Dr Preecha and the Institute is/are internationally renowned for gender reassignment surgery. After the gender reassignment surgery, the plaintiff had also undergone various psychological assessments and medical examinations by specialist medical practitioners in Malaysia, who have given opinions supporting the conclusion that from a medical perspective, the plaintiff is physically, anatomically and mentally a male.

[6] The plaintiff's current status is that he has been living his life as a man and is currently involved in a relationship with one Miss Foong Kar Wai. The relationship has been ongoing for about for about 2 1/2 years. They plan to get married sometime in the future. Both Miss Foong Kar Wai and the plaintiff's mother, Mdm Tang Bee Yin have filed affidavits to support the plaintiff's application herein.

[7] The plaintiff has exhibited photographs which were taken after the gender reassignment surgery (see exh A8 encl 2). Based on my own ocular inspection of the photographs, it is clear that for all outward appearances, the plaintiff looks like and has all the physical features and characteristics of a robust male person.

[8] Hence, the issue now is whether a declaration may be granted by this court to declare the plaintiff as a male. In so far as the medical reports are concerned, senior federal counsel who appeared for the defendant had initially indicated that he wished to cross-examine the medical specialists who had examined the plaintiff and given their respective reports with regards to the plaintiff's status from a medical perspective.

[9] However, the defendant later abandoned the proposal to cross-examine the plaintiff's medical specialists and there is no suggestion by the defendant that the opinion of the medical specialists are in any way flawed or erroneous. Indeed, in his submissions, the learned senior federal counsel did not make any suggestion that he was in any way impugning the conclusions and opinions of

the medical specialists. The defendant also did not produce any expert medical opinion of their own to rebut the plaintiff's medical reports.

[10] As such, it is deemed that the opinions and conclusions of the plaintiff's medical specialists are true, accurate and credible. The medical reports which the plaintiff relies on are as follows:

(a) Dr Preecha Tiewtranon (plastic surgeon) report dated 26 October 2009 (see exh A3 encl 2);

(b) Shanthini R Vanniasingham (chartered clinical psychologist) report dated 5 May 2010 (see exh A4 encl 2);

(c) Assoc Prof Dr Stephen T Jambunathan (consultant psychiatrist) reports dated 20 October 2011, 15 September 2013 and 15 October 2013 (see exh A5 encl 2);

(d) Dr Tan Ee Ping (consultant obstetrician and gynaecologist) report dated 24 July 2012 (see exh A6 encl 2);

(e) Assoc Prof Dr Khong Su Yen (consultant gynaecologist) report dated 8 April 2013 (see exh A7 encl 2); and

(f) Prof Datin Dr Sazilah Ahmad Sarji (radiologist) report dated 8 April 2013 (part of exh A7 encl 2).

[11] I will now summarise the submissions that were made on behalf of the plaintiff.

SUBMISSIONS MADE ON BEHALF OF THE PLAINTIFF

[12] Counsel for the plaintiff started by referring to the decision of the Court of Appeal in *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara* [2012] MLJU 1755; [2013] 4 CLJ 627 (*Kristie Chan*), where it was held that an applicant who seeks to obtain a declaration for change of gender is required to adduce evidence from experts in Malaysia on the following:

(a) what is gender;

(b) what makes a person a male or female;

(c) whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card.

[13] In so far as the psychological aspects of the plaintiff's gender are concerned, evidence was adduced through the opinion of Assoc Prof Dr Stephen T Jambunathan, a senior consultant psychiatrist in University Malaya Medical Centre who deposed in his affidavit and his medical reports that:

(a) The Plaintiff had performed a sex reassignment surgery to change his genitalia to those of a male. In this regard, an ultrasound of the Plaintiff's abdomen and pelvis was done on 8/4/2013 and it showed no evidence of ovaries nor uterus — paragraph 7(a);

(b) Gender also depends on other factors, such as one's lifestyle and psychological condition. In the case of the Plaintiff, the Plaintiff's lifestyle, values, conduct and behavior are consistent with the social and cultural norms of a male' — paragraph 7(b);

(c) ... the Plaintiff has been functioning as a male since pre-pubescence age, and that the Plaintiff is well adjusted and functional in the role as male in gender — paragraph 5;

(d) ... the Plaintiff has been feeling like a male consistently from the age of 6 years, and has been living the lifestyle of a male since then. The condition and gender preference of the Plaintiff is from birth, and is not an acquired sexual orientation. Moreover, the Plaintiff was also born with an abnormal female genitalia of an extraordinarily long clitoris (clitoris is a small and elongated erectile organ situated at the anterior portion of the vulva. It's homologous with the penis) — paragraph 7(c);

(e) I therefore conclude that *the Plaintiff is, in my professional opinion and by all psychological parameters, a male by gender* — paragraph 7(d);

(f) Based on my assessment, I support the above named person's application to update the national identification card gender label accordingly — 1st page of Exhibit B-1.

[14] In the medical report of Associate Professor Dr Khong Su Yen (consultant gynaecologist at the University Malaya Specialist Centre), dated 8 April 2013 it was stated that:

> Tan Pooi Yee was born on 7th April 1987 as a female but has since undergone Sex Reassignment Surgery on 13th October 2009. This *patient has since been functioning normally as a male in his daily life*.
>
> *On physical examination, there was no evidence of female characteristics such as breast tissue or vagina. I noted the presence of a penis with urethral opening consistent with male anatomy*. Ultrasonography performed today by consultant radiologist, Professor Sazilah, confirms no evidence of uterus or ovaries.
>
> Based on my assessment, I support the above named person's application to update the national identification card gender label.

[15] For the anatomical perspective and in order to demonstrate that the plaintiff did not possess any female organs, reference was made to a radiological report dated 8 April 2013 from Professor Datin Dr Sazilah bt Ahmad Sarji (radiologist in University of Malaya Specialist Centre) who opined that a radiological examination of the plaintiff showed that there was:

> No uterus or ovaries seen in pelvic region.

A ...

1. No sonographic evidence of ovaries and uterus.

2. ... This may represent a stent for reconstruction of male urethra.

B **[16]** Reference was a also made to medical statement dated 24 July 2012 from Dr Tan Ee Ping (Consultant Obstetrician and Gynaecologist in Pantai Hospital Ampang), who gave the following opinion:

C ... The *patient is physically not female*, as there is no breast tissue/uterus/ovaries/vagina. Noted to have a penis and scrotum. Therefore, this patient is anatomically more male. *There are no features of female anatomy*.

[17] Ms Shantini R Vanniasingham (chartered clinical psychologist at Sime Darby Medical Centre, Subang Jaya) in her medical report dated 5 May 2010 D said:

E I found him to be emotionally stable and visibly comfortable with the gender change. He is currently in a relationship and receives a considerable amount of support from his partner as well as from his immediate family members especially his mother. *He appears to be and reports that he is content with his current gender and demonstrated masculine behavioral patterns*.

[18] In his medical report dated 26 October 2009 Dr Preecha Tiewtranon (plastic surgeon) of the Institute said:

F ... He is a patient that I have diagnosed as a naturally occurring transsexual with gender-identity as male. He underwent operation Sex Reassignment Surgery done on October 13, 2009 ...

He is now having the male and penis and lost all the female genitalia and identities.

G His sex reassignment surgery is completed as well as successful result. Therefore, *he is now functioning as a male*.

[19] Based on the various medical reports produced by the plaintiff consisting mainly of reports by medical experts in Malaysia, it was submitted for the plaintiff that all the legal requirements as set out by the Court of Appeal H in *Kristie Chan* to warrant the grant of the declaration and relief as prayed for herein, had been satisfied.

[20] Counsel for the plaintiff relied heavily on the case of *Re JG, JG v Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90 ('*Re JG*') where a I similar declaration and relief was granted by the High Court. In that case, James Foong J (as he then was) held that:

[20] However on the other side of the globe, in Australia, as well as the European continent under the European Court of Justice, a more liberal approach is adopted. In *AG for the Commonwealth v Kevin & Ors* (2003) FAM CA 94 the full Court of

Appeal of the Family Court declined to follow *Corbett v Corbett* and declared, 'we should also treat biological factors as entirely secondary to psychological ones'. It went further to say, 'In other words, where a person's gender identification differs from his or her biological sex, the former should in all cases prevail. It would follow that all transsexuals would be treated in law according to the sex identification, regardless of whether they had undertaken any medical treatment to make their bodies conform with that identification'; thus upholding the principle that: 'we do not determine sex; in medicine we determine sex in which it is best for the individual to live'.

... And here, in this instant case, the medical men have spoken: the plaintiff is FEMALE. They have considered the sex change of the plaintiff as well as her psychological aspect. She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman.

... But surely for reasons as discussed, when it is based on medical evidence then the courts should play its part and grant relief where justice is due.

In this case, the first prayer (declaration that the plaintiff be declared a woman) is for a declaration which this court has power under the to grant. As for the second prayer(that the Registration Department be directed to change the last digit of plaintiff's identity card to a digit that reflects a female gender), it concerns only an administrative exercise and the defendant is empowered by law under of the to make a correction and alteration in the register and identity card. All these would give full effect to of the which states that 'no person shall be deprived of his life or personal liberty save in accordance with law'.

[21] In that case, James Foong J declined to follow an earlier decision by the late Justice VT Singam in *Wong Chiou Yong v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551; [2005] 1 CLJ 622; [2004] 3 MLRH 127, where the declaration was refused. Justice James Foong pointed out that in Commonwealth countries, such as Australia, England and New Zealand, as well as the European continent have recognised the reassigned gender of transsexual persons.

[22] In this regard, it is relevant to note that in *Attorney-General For The Commonwealth v Kevin and Others* [2003] FamCA 94, the Australian Court of Appeal (Family Court) held that:

Advances in medical science and surgery which make it possible for an individual to alter their sex necessitate courts having the judicial licence to decide the sex of a person in individual cases based upon the facts presented, rather than accepting characteristics which may be observed at birth

[23] Counsel also referred to *A v Chief Constable of West Yorkshire Police and another* [2004] 2 FCR 160 where the House of Lords held that:

[61] In this case, however, Ms A has done everything that she possibly could do to align her physical identity with her psychological identity. She has lived successfully

as a woman for many years. She has taken the appropriate hormone treatment and concluded a programme of surgery. She believes that she presents as a woman in every respect.

She meets entirely the plea of *Advocate General Ruiz-Jarabo Colomer* in KB's case (para 79):

> Transsexuals suffer the anguish of being convinced that they are victims of an error on the part of nature. Many have chosen suicide. At the end of a long and painful process, in which hormone treatment is followed by delicate surgery, medical science can offer them partial relief by making their external physical features correspond so far as possible to those of the sex to which they feel they belong.
>
> To my mind it is wrong that the law should take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won.
>
> In my view community law required in 1998 that such a person be recognised in her reassigned gender for the purposes covered by the Equal Treatment Directive ...

[24] Reference was also made to *Goodwin v United Kingdom* [2002] 2 FCR 577 where the European Court of Human Rights held that:

> The test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There were other important factors, such as the acceptance of the condition of gender identity disorder by the medical professions and health authorities within the contracting states, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceived that they properly belonged and the assumption by the transsexual of the social role of the assigned gender.

[25] The next case that was referred to was *Hamalainen v Finland* [2015] 1 FCR 379 where the European Court of Human Rights held that:

> 8. The applicant has an interest in being granted a female identification number because otherwise she will be required to identify herself as transgender — and thus reveal an aspect of her personality belonging to her most intimate sphere — every time the discrepancy between her gender presentation and her identity card has to be explained. We believe that this amounts to more than a regrettable 'inconvenience'(see para 87, above). In this connection we again refer to *Goodwin v UK* [2002] 2 FCR 577 ; [2002] 2 FLR 487, in which the Grand Chamber held (at para 77) that:
>
> > [t]he stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the court's view, be regarded as a minor inconvenience arising from a formality.
> >
> > A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

[26] Based on the jurisprudence emanating from the case laws referred to earlier, counsel for the plaintiff submitted that the court should follow the cases which demonstrate a more progressive approach and accord the plaintiff the gender status as recognised and validated by the medical profession. He said that the plaintiff has a constitutional right under art 5(1) of the Federal Constitution to be accorded the gender status which has been medically determined after the gender reassignment surgery and that the relevant legislation namely s 6 of the National Registration Act 1959 and s 41 of the Specific Relief Act 1950 should be liberally and not restrictively construed and that he should be granted the declaration that he is a male person.

[27] I now turn to the submission that was made on behalf of the defendant.

THE DEFENDANT'S CASE

[28] Learned senior federal counsel referred to s 41 of Specific Relief Act 1950 (Act 137) and the case of *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 and submitted that the court should be very cautious before granting such declaratory order. He also referred to the case of *Ikebife Ibeneweka and others v Peter Egbuna and another* [1964] 1 WLR 219 and *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 SC where, Lee Hun Hoe CJ (Borneo) said at p 107 (para G):

> In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the other hand as against the inconvenience and embarrassment that may result on the other hand.

[29] Learned senior federal counsel relied on the case of *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33 which dealt with gender reassignment and submitted that the plaintiff has a duty to show by credible evidence that all the requirements in relation to the plaintiff's sexual conditions and gender reassignment such as chromosomal, gonadal, genital and psychological factors have been established. In *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33 at p 44 Justice Omrod made the following observation:

> I must now deal with the anatomical and physiological anomalies of the sex organs, although I think that this part of the evidence is of marginal significance only in the present case. In other cases, it may be of cardinal importance. All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are —
>
> (i) Chromosomal factors,
>
> (ii) Gonadal factors (ie presence or absence of testes or ovaries)
>
> (iii) Genital factors (including internal sex organs)
>
> (iv) Psychological factors
>
> Some of the witnesses would add –

(v) Hormonal factors or sexual secondary sexual characteristics (such as distribution of hair, breast development, physique etc which are thought to reflect the balance between the male and female sex hormones in the body).

As Professor Dewhurst observed 'We do not determine sex — in medicine we determine the sex in which it is best for the individual to live'. These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination.

It is important to note that these criteria have been evolved by doctors for the purpose of systematising medical knowledge, and assisting in the difficult task of deciding the best way of managing unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities.

[30] At p 46 he said:

My conclusions of fact on this part of the case can be summarized, therefore as follows. The Defendants have been shown to have XY chromosomes and, therefore, to be of male chromosomal sex; to have had testicles prior to the operation and, therefore, to be of male gonadal sex; to have had male external genitalia without any evidence of internal or external female sex organs and, therefore, to be of male genital sex; and psychologically to be a transsexual...

... *The Defendant's operation, therefore, cannot affect her true sex. The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation*. (Emphasis added.)

[31] In that case, the plaintiff applied for a declaration that his marriage to the defendant was null and void because the defendant was, at all material times, a person of the male gender. It was not disputed that the defendant had been registered at birth as a male and that prior to the purported marriage, had undergone a gender reassignment surgery by removing the testicles and most of the scrotum and the construction of an artificial vagina. In granting the decree of nullity, Justice Omrod held that a person's gender was determined at birth and he remained biologically a man despite the fact that he had undergone a sex-change operation.

[32] *Corbett*'s case was considered by the English Court of Appeal in *R v Tan and others* [1983] 2 All ER 12 where the court extended the application of *Corbett*'s principle to situations beyond the marriage relationship context. The case of *R v Tan and others* pertained to a conviction under the Sexual Offences Act 1965 and depended on whether the defendant was a man. The court held that the principle enunciated in *Corbett*'s case applied to criminal cases as well. Justice Parker observed as follows:

In our judgment, both common sense and the desirability of certainty demand that the decision in *Corbett v Corbett* should apply for this purpose, not only of marriage, but also for a charge under section 30 of the Sexual Offence Act 1965 or sec 5 of the Sexual Offences Act 1967.

[33] *Corbett*'s case was subsequently followed in the case of *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 WLR 1174; [2003] 2 AC 467 where the central issue was 'whether can a person change the sex with which she or he is born with? In that case, Lord Nicholls of Birkenhead gave his opinion as follows:

A

B

> The present state of the law
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> [11] The present state of English law regarding the sex of transsexual people is represented by the well known decision of Ormrod J in *Corbett v Corbett* [1971] P 83, 104, 106. That case, like the present one, concerned the gender of a male to female transsexual in the context of the validity of a marriage. Ormrod J held that, in this context, the law should adopt the chromosomal, gonadal and genital tests. If all three are congruent, that should determine a person's sex for the purpose of marriage. Any operative intervention should be ignored. The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.
>
> [28] The distinction between male and female exists throughout the animal world ... In this country, as elsewhere; classification of a person as male or female has long conferred a legal status. It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal consequences affect many areas of life, from marriage and family law to gender-specific crime and competitive sport. It is not surprising; therefore, that society through its laws decides what objective biological criteria should be applied when categorizing a person as a female or a male. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction'.
>
> [40] I do not consider this (surgical intervention) would be a proper or indeed, a responsible basis on which to change the law. Surgical intervention takes many forms and, for a variety of reasons, is undertaken by different people to different extent. For men, it may mean castration or inversion of the penis to create a false vagina. For women, it may mean mastectomy, hysterectomy, or creation of a penis by phalloplasty. There seems to be no standard operation or recognized definition of the outcome of completed surgery. Today, the case before the house concerns Mrs Bellinger. Tomorrow's case in the high court will relate to undergo a less extensive course of surgery. The following week will be the case of a transsexual who has undergone hormonal treatment but who for medical reasons, has not been able to undergo any surgery. Then there will be transsexual person who is medically able to undergo all or part of the surgery but do not wish to do so. By what criteria are cases such as these to be decided?
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> ...
>
> [41] But the problem is more fundamental than this. It is questionable *whether the successful completion of some sort of surgical intervention should be essential prerequisite to the recognition of gender reassignment*. If it were, individuals may find themselves coerced into major surgical operations they otherwise would have not. *But the aim*

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> *of the surgery is to make the individual feel comfortable with his or her body. Not to 'turn a man into a woman' or vice versa ...*
>
> [45] Secondly, the recognition of gender reassignment for the purpose of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear and coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be drawn in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of a gender. These areas include education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulation, sports, the needs of decency, and birth certificates. Birth certificates, indeed are one of the matters of most concern transsexual people, because birth certificates are frequently required as proof of identity or age or place of birth. When, and in what in circumstances, should these certificates be capable of being reissued in a revised form which does not disclose that the person has undergone gender reassignment?
>
> [49] For these reasons I would not make a declaration that the marriage celebrated between Mr and Mrs Bellinger in 1981 was valid. A change as sought by Mrs Bellinger must be a matter for deliberation and decision for Parliament when the forthcoming Bill is introduced.

[34] The *Bellinger* case also recognised that the serious ramifications and implications which will follow from a judicial recognition of change of gender would be as follows:

> [37] This would represent a major change in the law, having far-reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.

[35] It was thus submitted for the defendant that the fact that a gender reassignment surgical procedure was conducted should not be and is not the criteria for such a declaration as the aim of such surgical gender reassignment intervention is just to make a person feel more comfortable with his or her own body, and not to 'turn a man into a woman' and vice versa as decided in *Bellinger*'s case.

[36] Learned senior federal counsel submitted quite trenchantly that the biological and sexual constitution of an individual is fixed at birth and cannot be changed either by the natural developments of the organs of the opposite sex or by medical or surgical means (as per Omrod J in *Corbett v Corbett*). Learned senior federal counsel said that the relevant criteria that was posited in *Bellinger*

and *Corbett* was accepted by the Court of Appeal in the case of *Kristie Chan.*

[37] He emphasised that in *Kristie Chan*'s case, Justice Datuk Abdul Wahab Patail had clearly enunciated that there must be evidence on the medical and psychological aspects in order for the court to consider such application. He drew the court's attention to the fact that in *Kristie Chan*'s case, the applicant failed to establish evidence in his affidavit on the definition of gender, the characteristics and/or function of a female and a male and whether the operation to change gender warranted a change to the details in the identification card.

[38] Learned senior federal counsel said that there must be a certainty in the law, and that this is reflected by the facts as stated in the birth certificate. He said, if the courts are allowed to declare a woman as a man today and vice versa, then it can also declare the same man to be a woman on a later date. In such a situation, there will be a state of confusion as to the applicability of laws on such persons and this is clearly against the public policy.

[39] Learned senior federal counsel also relied heavily on the case of *Wong Chiou Yong v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551; [2005] 1 CLJ 622; [2004] 3 MLRH 127, where the late Justice VT Singham dealt with a similar case and made the following findings:

> [1] The relevant legislation that the birth register may be amended only if an error was made in the initial registering of the birth is s 27 of Act 299/1957. The other relevant legislation is s 6(2) of Act 78/1959. In the present case, there was no error in the sex of the plaintiff as initially entered in the birth certificates and thereafter the identification card. There was no medical examination that there was a mistake in fact or substance at the time of the registration of birth. In fact, the biological change on the plaintiff was by medical or surgical means and this was supported by the plaintiff's own evidence and material produced before the court (pp 626 h, 627 a & 635 a–c).
>
> [2] A person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken. Further, the words 'man' and 'female' in the relevant documents do not include persons of reassigned sex and should not be contrary to the biological characteristics of the person when born (p 635 d–e).
>
> [3] The reassignment surgery did not affect the status of the plaintiff's true gender at the time of birth. The BC and IC were issued in accordance with the original identity of the plaintiff at the time of birth. Further, this court has no power to grant the application on the ground that there was gender reassignment surgery. There was also no express legislation to re-register the gender of a transsexual or register a transsexual under the guise of any error or fact or substance in the register pursuant to s 27(3) of Act 299 and s 6(2) Act 78 1959.

An entry in the register book, too, is regarded as a record of fact at the time of birth and the birth certificate constitutes a document revealing not current identity but historical facts (pp 635 f–h, 636 a–c & 639 f).

[4] The criteria for determining the sex of a child to be registered is not laid down in Act 299/1957 or in any regulation made thereunder. The practice of the registrar general is to apply exclusively the biological criteria, chromosomal, gonodal and genital sex as informed by the parents or guardian of the child. The fact that later in life the person's 'psychological sex' is at variance with its biological constituents cannot be considered to invoke s 27(3) of Act 299/1957 so as to imply that the initial entry was a factual error. A change in the initial entry will be contemplated in the following circumstances, namely, in cases of clerical error, error of fact or substance; wrong identification of the apparent and genital sex of the child at the time of birth; where the biological criteria are not congruent (p 640 d–f).

[5] Parliament could not have envisaged the type of grievance faced by the Plaintiff when Act 299/1957 and Act 78/1959 was introduced. The decision to be made on this application should not conflict with the spirit and intention of the legislature as expressly stipulated in Act 1957. There was also no evidence that the Plaintiff acquired all the biological characteristics of the assigned sex after the reassignment surgery (pp 641 b–c & 645 c).

[40] Based on the above-stated case, it was submitted for the defendant that in the present case, there is no error with regard to the sex of the plaintiff as initially entered in the birth certificate and thereafter in the national registration identity card. He pointed out that there was no medical examination to show that there was a mistake in fact or substance at the time of the registration of birth.

[41] Thus, it was submitted for the defendant that the words 'male' and 'female' in the relevant documents do not include persons of reassigned sex and should not be contrary to the biological characteristics of the person when born. He said that the gender reassignment surgery did not affect the status of the plaintiff's gender at the time of birth. Learned senior federal counsel also alluded to the fact that there was no evidence pertaining to the chromosomal factor.

[42] He therefore submitted that the plaintiff had not established the requirements as stipulated in the *Bellinger* and *Corbett* case. He said that it is outrageous for the plaintiff to suggest that the case of *Bellinger* and *Corbett* is inapplicable in Malaysia, as the Court of Appeal has recognised these requirements in the *Kristie Chan* case.

[43] He also referred to a recent decision by Zaleha bt Yusof J (as she then was) in *Fau En Ji v Ketua Pengarah Jabatan Pendaftaran Negara* [2015] 1 CLJ 803; [2014] 1 MLRHU 1097 where the learned judge dismissed the application and held as follows:

[12] Based on the above medical reports, I totally agree with the respondent's argument that:

(a) None of the medical officers gave evidence pertaining to the chromosomal factor;

(b) None of the medical officers gave evidence pertaining to the genital factor which involves internal sex organs and functions,

(c) None of the medical officer gave evidence pertaining to what can be defined as gender as a female and as a male.

(d) None of the medical officers gave evidence pertaining to what are the characteristic of a male and a female (generally); and

(e) None of the medical officers gave evidence pertaining to whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card, based on the requirements laid out in case law.

[13] Learned counsel for the applicant has argued that there is a clear departure from *Corbett* and *Bellinger* in that the Court of Appeal, in *Kristie Chan* was prepared to consider and take into account the psychological factor (in additional to the three biological factors) in determining the gender of the applicant. With due respect, the *Corbett* which was followed by *Bellinger* did not confine only to the three biological factors. As Ormrod J in *Corbett* had stated:

... there are at least, four criteria for assessing the sexual condition of an individual. These are:

i. chromosomal factors;

ii. gonodal factors (ie, presence or absence of testes or ovaries).

iii. genital factors (including internal sex organs).

iv. psychological factors.

Hence, I opine, psychological factor alone or gonodal factors are not sufficient to assess the applicant's sexual condition.

[44] It was further submitted that the provisions of law only provides for the alteration, correction or amendment as per the circumstances envisaged in reg 14 of PU(A) 472/1990 which does not include change of gender. In this regard, reference was yet again made to the case of *Wong Chiou Yong (P) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551; [2005] 1 CLJ 622; [2004] 3 MLRH 127, where Justice VT Singham decided as follows:

... Generally, this court has the discretion to grant declaratory relief but in the instant case there is insufficient evidence to support that the plaintiff's gender has been changed biologically to male but physically and physiologically as a man. Although the Plaintiff and the transsexuals cannot be left to live in legal limbo but however the remedy for registration as to their current gender is with parliament

> and not the courts as any fact changed in the registration of transsexual must be introduced by Act of Parliament and cannot probably be made by judicial pronouncement. This court cannot arrive at the construction conformable with the contention of the plaintiff's counsel that the registrar general be directed to alter or correct the register of births which no doubt will be against the scope and express words of the provision in s 27(3) of the ...

[45] Learned senior federal counsel referred to the case of *Wong Chiou Yong* and submitted that the application should be dismissed as there is no legal or statutory procedure for such amendment, alteration or correction to individuals with gender reassignment issues. He said that there are no legal provisions to enable the defendant to change the plaintiff's gender on the identification card and based on the considerations mentioned in *Bellinger's* case, this court should not make the declaration as sought by the plaintiff as the granting of the declaration order would have a massive impact on the society at large.

[46] He emphasised that there is also no express legislation to re-register the gender of transsexual persons or register a transsexual under the guise of any error of fact or substance in the register pursuant to s 27(3) of the Birth and Death Registration Act 1957 and s 6(2) of National Registration Act 1959.

ANALYSIS AND CONCLUSION

[47] The first point to be made is that *Corbett's* case was a controversial one. It attracted much criticism. Indeed, in *Bellinger*'s case, Lord Nicholls had alluded to the criticism that emanated from the narrow criteria that was enunciated in *Corbett*'s case and said:

> [13] The decision in *Corbett* has attracted much criticism, from the medical profession and elsewhere. The criteria for designating a person as male or female are complex. It is too 'reductionistic' to have regard only to the three *Corbett* factors of chromosomes, gonads and genitalia. This approach ignores 'the compelling significance of the psychological status of the person as a man or a woman'. Further, the application of the *Corbett* approach leads to a substantially different outcome in the cases of a post-operative inter-sexual person and a post-operative transsexual person, even though, post-operatively, the bodies of the two individuals may be remarkably similar.
>
> In overseas jurisdictions *Corbett* has not been universally followed. It was followed, for instance, in South Africa in *W v W* (1976) (2) SALR 308 and in Canada in *M v M (A)* (1984) 42 RFL (2d) 267. But more recently the trend has been in the opposite direction. Thus, for instance, in New Zealand and Australia post-operative transsexuals' assigned sex has been recognised for the purpose of validating their marriages. In New Zealand in *General v Otahuhu Family Court* [1995] 1 NZLR 603, 630, Ellis J noted that once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex. He held there is no social

advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. An adequate test is whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex.

In Australia Chisholm J reached a similar conclusion in *Re Kevin (validity of marriage of transsexual)* [2001] Fam CA 1074, a case decided after the decision of the Court of Appeal in the present case. Chisholm J's extensive judgment contains a powerful critique of the existing law and a useful review of international developments. Having regard to the view I take of this case, it is not necessary for me to elaborate on his views. Suffice to say, his conclusion was that there is no 'formulaic solution' to determining the sex of an individual for the purpose of the law of marriage. All relevant matters need to be considered, including the person's life experiences and self-perception. Post-operative transsexual people will normally be members of their reassigned sex.

This decision was the subject of an appeal. Very recently, on 21 February 2003, the full court of the Federal Family Court dismissed the appeal: Appeal no. EA/97/2001 (unreported). The judgment of the full court contains an invaluable survey of the authorities and the issues. The court concluded that in the relevant Commonwealth marriage statute the words 'man' and 'woman' should be given their ordinary, everyday contemporary meaning. Chisholm J was entitled to conclude, as a question of fact, that the word 'man' includes a post-operative female to male transsexual person. The full court left open the 'more difficult' question of pre-operative transsexual persons.

[48] For completeness on this point I should add that after the *Corbett* and *Bellinger* cases, there was legislative intervention in the United Kingdom by way of the Gender Recognition Act 2004 ('the GRA') which allows transgender people to legally change their.

[49] The GRA came into effect on 4 April 2005 and gives people legal recognition as members of the sex appropriate to their (male or female) and allowing them to acquire a new and according them full recognition of their acquired sex in law for all purposes, including marriage. The GRA was the legislative response by the United Kingdom to overcome violation of articles 8 and 12 of the European Convention of Human Rights.

[50] In so far as Malaysia is concerned in *Wong Chiou Yong*'s case, the late Justice VT Singham followed the jurisprudence which emanated from cases such as *Corbett* and *Bellinger* and took the view, inter alia, that the absence of chromosomal evidence was fatal to any application of this nature. The learned judge also alluded to the absence of legal statutory provisions for amendments to be made to the initial re-registration of birth so as to cater for the change in gender of persons who have undergone gender reassignment surgery. The learned judge in *Wong Chiou Yong*'s case left it to Parliament to find a solution to the predicament of persons who had undergone gender reassignment

surgery and posited that the court was not empowered to make a declaration that the applicant was now of a different gender. To-date, there is no legislation in Malaysia catering for registration issues as a result of gender reassignment.

[51] In *Re JG*, James Foong J took a different view. He opined that there were two streams of thought on the matter. He said that the school of thought which insisted that the person must fulfill the requirements stipulated in *Corbett/Bellinger* is not progressive as it is in conflict with the opinion of the medical profession, which views gender from a different perspective.

[52] As I have stated earlier in my judgment, the medical evidence presented in this case individually, collectively and unambiguously concludes that the plaintiff is a male.

[53] In so far as the so-called chromosomal requirement is concerned, no doubt, there was no reference to male chromosomes in any of the medical reports. But it is a matter of logic and a recognised scientific fact that the plaintiff does not and cannot have male chromosome as he was born as a female. The chromosomal requirement is a complete non-starter as it is akin to asking for the impossible.

[54] In *Re Kristie Chan*, the Court of Appeal dismissed the appeal and upheld the decision of the judicial commissioner who had dismissed the application for a declaration on change of gender as there was insufficient evidence before the court on the issue of the plaintiff's gender. In my view, the Court of Appeal did not lay down any inflexible rule that the applicant seeking a declaration as a result of gender reassignment surgery, must establish, inter alia, the chromosomal requirement.

[55] In *Fau En Ji* the High Court was clearly dealing with an application for judicial review and the application was dismissed, inter alia, because the Court was of the opinion that the application should have first obtained a declaration before embarking on a judicial review. I am not sure if that is a correct statement of the law as a declaration can be a relief in a judicial review application (see: O 53 r 2(2) of the Rules of Court 2012). At any rate, the learned judge said that the topic of change of gender was a complex issue which required the evidence of witnesses (see: para 18 of the judgment).

[56] It is interesting and significant that in *Fau En Ji*'s case, the learned judge made a passing reference to the defendant's internal directive on change of gender. In this regard, reference may be made to para 21 of the affidavit in reply by Dato' Sulaiman bin Hj Keling (encl 9) where the deponent states that there is no statutory provision or legal mechanism for a declaration for change of gender. It reads in Bahasa Malaysia as follows:

Seterusnya, setelah dinasihatkan oleh Peguam Kanan Persekutuan, saya dengan sesungguhnya menyatakan bahwa tiada undang-undang di Negara ini yang menyediakan peruntukkan atau mekanisma bagi deklarasi penukaran jantina.

[57] Then, in para 4 of his further affidavit, the same deponent states that the defendant will not permit any change of gender 'save where there is a Court Order' and he referred to the department's internal directive named as 'Arahan Jabatan Pendaftaran Negara Bil 9/2007' (paragraph 5.7.1)'. In this regard, he said:

Merujuk kepada perenggan 21 Afidavit jawapan Defendan, setelah dinasihatkan oleh Peguam Kanan Persekutuan , saya sesungguhnya menyatakan bahawa Jabatan Pendaftaran Negrara Malaysia tidak membenarkan penukaran nama kerana menukar nama jantina melainkan atas perintah mahkamah berdasarkan Arahan Jabatan Pendaftaran Negara Bil. 9/2007 di perenggan nombor 5.7.1.

[58] The defendant's said 'Arahan' or departmental directive reads as follows:

5.7 Penukaran Nama Kerana Menukar Jantina

5.7.1 *Pindaan jantina dalam kad pengenalan adalah tidak dibenarkan kecuali atas Perintah Mahkamah*.

5.7.2 Permohonan pertukaran nama kerana berlaku pertukaran jantina hendaklah mengemukakan dokumen-dokumen berikut:-

(a) Perintah Mahkamah yang mengandungi butir-butir pengisytiharan jantina baru pemohon;

(b) Surat pengesahan doktor Kerajaan (jika ada);

(c) Surat pengesahan pembedahan penukaran jantina yang dikeluarkan oleh Hospital berkenaan;

(d) Sijil Lahir (asal dan salinan). (Emphasis added.)

[59] As I said at the outset, the opinion on this topic is rather divided. The Malaysian cases that have been referred to are at best judicial guideposts. The cases of *JG, Wong Chiou Yong* and *Fau En Ji* are decisions of the High Court. They are persuasive but are not binding on this court and I am entitled to depart from any one of those cases. The doctrine of stare decisis does not apply in respect of decisions by courts of co-ordinate jurisdiction. In *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211 at p 213; [1966] LNS 187; [1966] 1 MLRH 288, Ong Hock Thye FJ speaking for the then Federal Court said:

Each court is bound by the decisions of courts above it, but 'individual judges are not bound by each other's decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinions of their brethren' ... within the past decade and even the last lustrum, judges in Malaya have, on several

occasions respectfully agreed to differ, as may be seen from the reports in *The Malayan Law Journal*.

[60] It is significant to note that *Kristie Chan*'s case and *Fau En Ji*'s case do not refer to *Re JG*. I am not sure whether the decision of the High Court in *Re JG* was drawn to the attention of the Court of Appeal and the High Court respectively. Next, it may be noted that in *Kristie*'s case, the Court of Appeal was somewhat troubled by the purpose for which the declaration was being sought. In that case, the applicant who had undergone gender reassignment surgery had highlighted the difficulties he was facing with obtaining employment, travel, education and other personal issues. I am not at all clear as to why those reasons should be frowned upon as those are legitimate reasons and concerns which any applicant would want to overcome.

[61] From my reading of *Kristie Chan*'s case, it appears that the Court of Appeal 'referred' to the cases of *Corbett, Bellinger* and *Wong Chiou Yong* without stating unequivocally that it was endorsing the chromosomal requirement to establish gender and/or that the ruling in *Corbett* and *Bellinger* was to be regarded as part of Malaysian jurisprudence. The language of the Court of Appeal does not suggest that it went that far. Of course, it might have been different if the Court of Appeal in *Kristie Chan*'s case had unequivocally approved of the approach that was taken by the courts in *Corbett, Bellinger* and *Wong Chiou Yong*. And so, it would be erroneous to suggest that the Court of Appeal in *Kristie Chan*'s case had laid down the chromosomal requirement as a criteria for determining whether to grant declaration for change of gender. It is clear that in *Kristie Chan*'s case, the Court of Appeal was just not satisfied with the quality of the medical and psychiatric evidence that was produced.

[62] Hence, in *Kristie Chan*'s case, the Court of Appeal was effectively leaving open the possibility that in an appropriate case and depending on the quality and credibility of the medical evidence and other supporting evidence, the court could make a determination and grant the relevant declarations that were sought with regards to the reassigned gender.

[63] In this regard, it should also be noted that the defendant's 'Arahan' is dated sometime in 2007 which chronologically, would be after the High Courts had rendered their decision in the *Wong Chiou Yong* and *Re JG* cases. The genesis of the 'Arahan' remains elusive and there was no evidence before the court as to what impelled the defendant to come up with the 'Arahan'. Whatever may be the case, the 'Arahan' demonstrates that the defendant themselves have recognised that changes can be made to the national registration identity card, with regards to change of gender provided an order of court is obtained.

[64] In so far as the court's approach is concerned, in my view, it all boils down to the quality and persuasiveness of the medical and psychiatric evidence and the factual matrix that is presented to the court as the application for a declaration must be for genuine reasons and not for spurious or suspicious reasons. Here, I find that this is a genuine application by a person who has been certified by the medical profession to be a male. In my view, the chromosomal requirement is archaic and should be discarded because scientifically it is impossible for a biological male to have female chromosomes and vice versa. The male XY and female XX chromosome will remain static throughout the individual's natural life. Hence, it is naïve to suggest that an applicant has to show that he or she has the chromosome of the reassigned sex. It plainly means that to insist on the chromosomal requirement is to ask for the impossible and I think that nothing can be more unjust than that.

[65] To my mind, the better view with regards to the chromosomal issue is that which has been encapsulated in the approach that was taken by the Family Court in Australia in *Attorney-General For the Commonwealth v Kevin and Others* 2003 FamCA 94 where at para 295 of the judgment, the court emphasised the importance of abandoning the chromosomal factor and highlighting the imperative need to view the matter from the physiological and physiological perspective. This is what was said by the Family Court in Australia:

> [295] We are in any event much more attracted by the reasoning of Thorpe LJ. We have difficulty in understanding how the *Corbett* test can continue to be applied in face of the evidence, not only as to brain sex, but also as to the importance of psyche in determining sex and gender. The fact that these issues cannot be physically determined at birth seems to us to present a strong argument; first, that a child's sex cannot be finally determined at birth; and second, that any determination at that stage is not and should be immutable. We agree with the views expressed by Thorpe LJ (at [155]) when he said:
>
> > To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seems right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth.

[66] Before I conclude I would like to touch on a point that was made by learned senior federal counsel where he said that a declaration to recognise the individual's reassigned gender can create confusion and uncertainty. He also said that the court must consider the impact on society. In this regard, I do think that the suggestion with regards to confusion and uncertainty is not just

overstated but is actually quite to the contrary. A declaration to recognise the applicant's reassigned gender will in my view contribute to certainty and avoid confusion and quite possibly conflict as well. In the present case, the plaintiff is for all intents and purposes a male person. It has been established that the medical profession has unambiguously determined that he is physically, anatomically and psychologically a male. As such, it only remains for the legal process to declare that he is a male person. Were it otherwise, then based on the plaintiff's current legal status, society would be compelled to regard and accept him as a female and allow him, for instance, to use the female washroom and other gender sensitive facilities meant for members of the female gender.

[67] Of course, there are various other examples that could be given to demonstrate the utter confusion and apprehension that may be caused in different settings and contextual situations if the plaintiff has to remain legally a female.

[68] In my view, there is no legal impediment or restriction to the grant of a declaration to legally recognise the plaintiff as a male person and for his national registration identity card to be changed to reflect the change in gender so that he is able to live as a male and be accepted by society as a male. No doubt certain theological or other quarters may decry such curial recognition as an interference with the gender of a person that was determined at birth by nature. But such a line of thinking stems from the old or orthodox school which holds the view that the gender which is determined at birth is fossilised and is incapable of change or reassignment.

[69] With the advent and advances of modern medicine and surgery and enhancement of human knowledge it is now medically possible to achieve gender reassignment via delicate plastic and reconstructive surgery with the best possible outcome and to make the patient's physical features correspond to the gender to which the patient feels he or she belongs to. I am of course, acutely aware that gender reassignment surgery is a life changing decision and as such it is not one that is taken or to be taken lightly.

[70] As for safeguards against abuse, I take comfort and refuge in the high ethical standards of the medical profession whose members are unlikely to hastily undertake these surgeries as they would invariably have to satisfy themselves that the patient is mentally ready and that there is adequate and compelling psychological and psychiatric assessment and outcome before any gender reassignment surgery is done.

[71] As for the suggestion that a person will seek to be reassigned to a different gender and later seek a restoration of the original gender on another day, I find that it is not just far-fetched, but is also reflective of an alarmist

mindset. The reality is that it is highly unlikely or remote that a person will seek to revert to his or her original gender after having undergone gender reassignment surgery. At any rate, whilst there is a possibility of such an eventuality happening, the probabilities are most certainly very low or almost remote. For now, based on the facts and circumstances, it is my ruling that the plaintiff in the present case, who was born as a female, has grown up behaving and living like a male and has undergone gender reassignment surgery and has obtained validation of the medical profession that he is a male person, has in my view, satisfied the threshold or criteria that was set out in *Kristie Chan*'s case.

[72] In my view, the plaintiff has a precious constitutional right to life under art 5(1) of the Federal Constitution of Malaysia and the concept of 'life' under art 5(1) must necessarily encompass the plaintiff's right to live with dignity as a male and be legally accorded judicial recognition as a male. It is apposite in this regard to quote from Professor Dr Shad Saleem Faruqi who said at p 206 in his book 'Document of Destiny — The Constitution of the Federation of Malaysia' that 'the word 'life' does not refer merely to the animal existence of breathing and living. It covers *the right to live with human dignity.'*

[73] For the reasons as discussed above, I hold that the plaintiff is entitled to the declarations that he seeks by way of the originating summons.

ORDER

[74] I granted the following orders:

(a) a declaration that the plaintiff, who had undergone a gender reassignment surgery, be declared a man;

(b) the defendant be directed to change the plaintiff's identity card to 'Tan Yien How';

(c) the defendant be directed to change the last digit of the plaintiff's identity card to a digit that reflects the male gender; and

(d) no order as to costs.

Order accordingly.

Application allowed.

Reported by Ashok Kumar